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80-1328

No. .

In the

Supreme Court of the United States.

OCTOBER TERM, 1980.

BARTHOLOMEW EGAN AND RICHARD HART,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Question Presented.*

Whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars retrial following the declaration of a mistrial upon motion of a defendant, where that request for mistrial is attributable to the gross negligence of the prosecutor?

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* In addition to petitioners Egan and Hart, Angel Daniel Pacheco and Jose Pedro Vasquez-Castro were parties to the proceedings below in both the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit. They are not parties to this petition.

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No. .

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v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Bartholomew Egan and Richard Hart petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 29, 1980.

Opinions Below.

The United States District Court for the Southern District of New York denied petitioners' motion to prohibit retrial on double jeopardy grounds in an opinion filed on August 27, 1980 and amended on September 26, 1980. The opinion is

unreported and is reproduced in the appendix at p. 1a. The judgment of the District Court was affirmed by the United States Court of Appeals for the Second Circuit in an unreported opinion filed on December 29, 1980. That opinion is reproduced in the appendix at p. 12a.

Jurisdiction.

The judgment of the Court of Appeals was entered on December 29, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provision Involved.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ..

Statement of the Case.

On March 22, 1980, after following the vessel "Jose Gregorio" on the high seas for more than 24 hours, the Coast Guard boarded and seized the vessel and its cargo of marijuana and arrested the crew, including petitioners Egan and Hart. Petitioners and two others were charged in a three-count indict-

ment with various marijuana-related offenses, all of which required proof that the cargo was destined for the United States. Trial began in the United States District Court for the Southern District of New York on July 7, 1980. As stated by defense counsel in his opening, the issue for the jury was whether the government would prove, beyond a reasonable doubt, that petitioners intended to bring the vessel and its cargo into the United States, rather than to a foreign country (see A. 13a).

In its case in chief the government introduced evidence that the "Jose Gregorio" had been initially sighted by the Coast Guard approximately 85-90 miles from the United States coast near an approach to New York harbor. However, Coast Guard officers testified that the vessel's initial course would have taken it to Canada, south of Newfoundland.* The government also introduced the only chart found on board the vessel — a chart with no course plotted on it entitled "Approaches to New York Harbor." The government rested its case in chief as to petitioners on July 10, 1980, without any further evidence of the vessel's destination (see A. 2a).

That same day the defense presented two fishermen who testified as to contacts with the "Jose Gregorio" 80-90 miles offshore on March 20, 1980. One of them identified the chart introduced by the government as a chart that *he* had provided to the "Jose Gregorio" on that date and had marked to show the vessel's position. A third witness testified that he had known one of the petitioners since 1973 and knew that he could navigate Canadian waters without a chart (A. 3a).

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* The officers also testified that a subsequent temporary deviation from that course, which, if maintained, would have taken the vessel into United States waters near Nantucket, could have been attributable to the weather conditions — conditions which shortly thereafter necessitated a course change to the southeast. The commander of the Coast Guard cutter further testified that the normal practice would have been to correct the deviant course to the initial course, and that he had no reason to believe the vessel was not following normal practice.

The following day the government announced its intent to introduce, on rebuttal, evidence concerning thirteen men arrested with four empty trucks on the coast of Maine nine days prior to the seizure of the "Jose Gregorio." The government alleged that evidence seized at that time linked petitioners to the events in Maine and that those events supported an inference of intent to import the cargo into Maine. It also announced that its rebuttal involved substantial discovery material and § 3500 material previously undisclosed to petitioners (A. 4a).

Petitioners objected to the proposed rebuttal evidence as a governmental effort to present an entirely new case — an attempt to salvage its case by changing its whole theory of prosecution and, in effect, trying petitioners by ambush. They argued that the government knew from the outset that the destination of the vessel was the key question and had known of the alleged Maine connection for a substantial period of time but had deliberately held back disclosure of that evidence — seized four months prior to trial — as a prosecutorial tactical decision (A. 4a, 7a-8a).

Although conceding that the Drug Enforcement Administration made the connection between Maine and New York shortly after the March, 1980 seizure of the "Jose Gregorio," and admitting that he himself had suspected that connection early on, the Assistant United States Attorney maintained that he had not learned of the specific availability of the evidence he sought to introduce on rebuttal until the day before he rested his case and had not spoken to the witnesses until the day after he rested (A. 7a-8a).

Based on these representations, and additional in-camera submissions by the prosecutor, the court held that the rebuttal evidence would be admitted and that the government would go forward after a two-day adjournment. Defense counsel's reluctant motion for mistrial — predicated on an inability to

prepare to meet this essentially new case in two days — was granted and the jury was discharged (A. 4a-5a).

On August 5, 1980, petitioners filed a motion to prohibit retrial on double jeopardy grounds, alleging prosecutorial actions intended to prejudice the defense, or, at minimum, gross negligence in failing to obtain the "rebuttal" evidence in time to afford timely discovery and introduce the evidence in the government's case in chief. The motion was denied in an opinion filed on August 27, 1980 and amended on September 26, 1980 (A. 1a).

In essence, the court found that although the government's failure to "connect up" the Maine evidence before it rested was "unfortunate," and its deliberate election to rest without introducing the evidence after learning of the specific evidentiary connection may have been "unwise," there was no prosecutorial overreaching barring retrial (A. 8a, 10a).

On appeal, the United States Court of Appeals for the Second Circuit affirmed the denial of petitioners' motion, finding sufficient evidence on the record to support the finding of no governmental bad faith or actions intended to provoke a mistrial request. The court specifically rejected petitioners' contention that when a defendant's motion for mistrial is attributable to the gross negligence of the prosecutor, the Double Jeopardy Clause bars retrial (A. 14a, n.*).

Reasons Why the Writ Should be Granted.

The circumstances under which the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits retrial, following the declaration of a mistrial upon motion of a defendant, is an area in need of further clarification by this Court. The Double Jeopardy Clause estab-

lishes "a constitutional policy of finality for the defendant's benefit in federal criminal proceedings," *United States* v. *Jorn*, 400 U.S. 470, 479 (1971). This "valued right to have his trial completed by a particular tribunal" (*id.*, at 484), although not without limitations, is not to be overridden lightly. Thus, even though, as a general rule, a defendant may be retried following a mistrial granted at his own request, retrial is not permitted where his request is a product of prosecutorial overreaching.

The type of conduct constituting prosecutorial overreaching has not been fully defined. This Court has stated that it includes prosecutorial error "motivated by or undertaken to harass or prejudice" a defendant (*Lee* v. *United States*, 432 U.S. 23, 33-34 (1974)), as well as intentional actions calculated to provoke a defense request for mistrial to provide the government with a second opportunity to convict (see, *e.g.*, *United States* v. *Dinitz*, 424 U.S. 600 (1976)). It has also stated that merely inadvertent, good faith error does not constitute proscribed overreaching. Whether a mistrial attributable to grossly negligent prosecutorial conduct bars retrial is an issue which has not been directly addressed by this Court and is one which has resulted in a conflict among the circuits. While the court below held that grossly negligent conduct does not constitute proscribed prosecutorial overreaching, the United States Courts of Appeals for both the Fifth and Eighth Circuits have held to the contrary. See, *e.g.*, *United States* v. *Luttrell*, 609 F.2d 1190, 1191 (5th Cir. 1980) ("When a mistrial is granted on motion by the defendant, the government is barred from reprosecuting him only if the prosecutorial misconduct giving rise to the mistrial is 'grossly negligent or intentional'"); *United States* v. *Garza*, 603 F.2d 578, 580 (5th Cir. 1979); *United States* v. *Davis*, 589 F.2d 904, 906 (5th Cir. 1979), *cert. den.* 441 U.S. 950 (1979); *United States* v. *Martin*, 561 F.2d 135, 140 (8th Cir. 1977). Resolution of this conflict by this

Court is important to the proper, equitable and uniform administration of justice throughout the federal judicial system.

Petitioners contend that when a defense motion for mistrial is attributable to gross negligence on the part of the prosecutor, the Double Jeopardy Clause bars reprosecution. Gross negligence goes beyond inadvertent and unwitting error. As defined in other contexts, it "is the failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result." *Robinson Insurance & Real Estate, Inc.* v. *Southwestern Bell Telephone Company*, 366 F.Supp. 307, 311 (W.D. Ark. 1973). It "is characterized by conscious indifference to or reckless disregard of the rights of others." *Ryan* v. *Foster & Marshall, Inc.*, 556 F.2d 460, 464 (9th Cir. 1977). "Gross negligence means that the defendant has not only acted carelessly in making a mistake, but that it was so extremely careless that it was equivalent to recklessness." *Hong Kong Export Credit Insurance Corp.* v. *Dunn & Bradstreet*, 414 F.Supp. 153, 160 (S.D. N.Y. 1975). Distinguishing between negligence and gross negligence "is not to indulge in technicalities. There is a clear and significant difference between these two standards; one requires only a showing of unreasonableness while the other demands evidence of near recklessness or shockingly unjustified and unreasonable action." *Leite* v. *City of Providence*, 463 F.Supp. 585, 591 (D. R.I. 1978).

Based on the definitions set forth above, petitioners submit that gross negligence, like conduct undertaken to harass or prejudice a defendant, constitutes constitutionally impermissible prosecutorial overreaching. It is the equivalent of the "reckless disregard" which this Court has refused to condone in the Fourth Amendment context. In *Franks* v. *Delaware*, 438 U.S. 154 (1978), this Court held that material misstatements in a facially sufficient affidavit in support of a search warrant, made with reckless disregard for the truth, will ren-

der the affidavit invalid and require suppression of the evidence seized pursuant to the warrant predicated on that affidavit. If sanctions which may effectively bar prosecution (by requiring suppression of essential evidence) are required for "reckless disregard" of Fourth Amendment protections, they should similarly be imposed for "gross negligence" which forces a defendant to request a mistrial and, thereby, relinquish his constitutional right to have his guilt or innocence adjudicated at a single trial.

Conclusion.

For the foregoing reasons, petitioners respectfully request that this Honorable Court grant their petition for a writ of certiorari to resolve the conflict among the circuits as to whether the gross negligence of the prosecutor constitutes the prosecutorial overreaching proscribed by the Double Jeopardy Clause.

If this Court concludes that the Double Jeopardy Clause does bar retrial where a defendant's request for mistrial is attributable to the gross negligence of the prosecutor, the decision below should be vacated and the case should be re-

manded for a determination as to whether the prosecutor's actions here constituted gross negligence.

Respectfully submitted,

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Appendix.

United States District Court
Southern District of New York

UNITED STATES OF AMERICA,

v.

BARTHOLOMEW EGAN, 80 Cr. 207 (RWS)
RICHARD HART,
ANGEL DANIEL PACHECO, AND
JOSE PEDRO VASQUEZ-CASTRO, **Opinion**

DEFENDANTS.

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SWEET, DISTRICT JUDGE

The defendants have moved for an order preventing retrial on the ground of Double Jeopardy and granting dismissal pursuant to Fed.R.Cr.P. 29. The motions are denied.

The first trial in this action commenced on July 7, 1980 following the court's denial of defendants' motions to suppress. It was represented to be a three day trial. The Government presented evidence that in March, 1980 the defendants had been seized on board the stateless vessel JOSE GREGORIO, which contained thirty tons of marijuana, in international waters off the coast of Long Island. Government's Exhibit 1 was a chart entitled "Approaches to New York Harbor" which was found on the bridge of the JOSE GREGORIO shortly after its seizure. Despite the fact that the ship had sailed from the coast of Colombia to the United States, this chart was the sole chart found on board.

Prior to trial, the defendants had moved to suppress evidence of prior criminal acts of Pacheco and Vasquez-Castro or in the alternative for severances. I denied the motions. When the defendants renewed the motions on Wednesday, July 9, 1979, I proposed a bifurcation procedure under which the jury would first deliberate on the case against Hart and Egan, the Government would introduce the prior act evidence against

Pacheco and Vasquez-Castro, and the case against the latter two defendants would be submitted to the same jury. The defendants responded enthusiastically, and the Government opposed.

The Government's case, with the exception of some stipulations, charts and the similar act evidence, was completed on the afternoon of July 9. The Government initially sought an adjournment to consider whether to seek a writ of mandamus relating to the proposed bifurcation. The trial resumed on July 10 at 2:00 p.m., and the court overruled the Government's objections and decided to implement the bifurcation procedure. The Government then rested its case as to Hart and Egan. A Rule 29 motion by the defendants was denied by the court.

The evidence presented by Hart and Egan consisted of three witnesses. Mark Blaney, a fisherman, testified that on March 20, 1980, the JOSE GREGORIO approached his fishing boat in the Hudson Canyon, 80 to 90 miles south of Long Island. Defendant Hart aboard the JOSE GREGORIO offered Blaney $20,000 to take him ashore because he was sick. Blaney testified that he refused, but that because Hart was apparently lost, he gave Hart the chart entitled "Approaches to New York Harbor", Government's Exhibit 1.

A second fisherman testified that while in the Hudson Canyon on March 20, Hart had also offered him $20,000 to take him ashore. A third witness testified that he was an experienced fisherman on the East Coast of North America, that he had known Hart since 1973, and that Hart was familiar with Canadian waters and could sail into these waters without a chart.

On Friday, July 11, the Government again sought an adjournment to permit it to consider seeking a writ of mandamus against implementation of the bifurcation procedure. At this juncture, the Government disclosed, *in camera*, its proposed

rebuttal case. The Government proposed to introduce evidence of the seizure, on March 14, 1980, of thirteen armed men with four empty trucks on the Coast of Maine. The Government indicated that it could establish links between certain of these men and the seizure of the JOSE GREGORIO nine days later. The court granted a continuance until 1 p.m.

In the afternoon, the Government determined not to seek a writ of mandamus. It announced that its rebuttal case would require disclosure of substantial materials under 18 U.S.C. § 3500. The defense raised objections to presentation of such a rebuttal. The jury was excused until Monday morning. The Government then revealed the outline of its rebuttal case to the defendants.

The defendants moved to exclude the rebuttal evidence, arguing that the Government had known of this evidence prior to resting, had made a tactical decision not to present it, and therefore that it did not constitute proper rebuttal. In response, Assistant United States Attorney Denton stated that although he had been aware of the Maine incident for some time, he had not learned of a specific evidentiary connection with these defendants until Wednesday evening, July 9 and had not seen the evidence until the morning of July 11. He represented that no tactical decision had been made not to secure this evidence earlier in order to lull the defendants into a defense. Further motions were adjourned until Monday, July 14.

On July 14, the defendants moved to exclude the Government's proposed rebuttal evidence on the grounds, first, that it did not constitute proper rebuttal, second, that it was so extensive that the defendants would be unable to prepare properly to combat it, and third, that the new evidence constituted a fundamental change in the Government's theory of the case which, in the posture of the case, would severely prejudice the defendants. The court ruled that the Government's evidence

was relevant to a rebuttal case, but granted an adjournment for two days to permit the defendants to prepare to meet the new evidence. New motions for severances were denied.

At this point the defendants moved for a mistrial primarily, as counsel for Egan stated, to afford them "the time to investigate all aspects of this new material and to prepare, in effect, for a new case which is what I think it is." Egan's counsel stated that he reserved

> any other rights that I may have had with respect to the government putting me in this position where I am forced to make the motion for a mistrial. Had they, without their negligence, or gross negligence on behalf of the DEA and perhaps negligence on the part of the United States Attorney's office, done their work in the beginning, this never would have occurred. And I would not be in a position of having presented a defense and then having to move off of it and make a motion for a mistrial.

The Government opposed these motions.

I granted the motions for a mistrial for several reasons. First, in view of its case in chief, the rebuttal evidence clearly constituted a surprise for the defense, just as the defense case clearly constituted a surprise for the Government. Although I had concluded that the Government's rebuttal case was admissible and that an additional two days would be sufficient to enable the defense to meet this evidence, when the defendants decided to seek a mistrial, rather than to proceed, I concluded that under all the circumstances the interests of justice would be served by starting afresh. Second, I had by that date assumed responsibilities as Part I Judge and was concerned about the effect of delay on those duties. Third, the jury had already been required to endure substantial delays resulting

from the procedural skirmishes, which might well have caused confusion and therefore prejudice to all parties. Fourth, the admission of the rebuttal evidence raised new doubts about the efficacy of my bifurcation procedure, already announced to the jury. In view of all these circumstances, I granted the defendants' motions for a mistrial. In open court, counsel for each of the four defendants declared that his client moved for and consented to the mistrial.

The Supreme Court has held that "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution [imposed by the Double Jeopardy Clause of the Fifth Amendment], even if the defendant's motion is necessitated by prosecutorial or judicial error." *United States* v. *Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion). The Court has emphasized,

> Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.

United States v. *Scott*, 437 U.S. 82, 93 (1978).

Nonetheless, if the defendant's motion for a mistrial is necessitated by prosecutorial or judicial error which is calculated to induce the defendant to move for a mistrial or is "motivated by bad faith or undertaken to harass or prejudice" the defendant, the Double Jeopardy Clause may prevent retrial. *Lee* v. *United States*, 432 U.S. 23, 32-33 (1977). As the Court stated in *United States* v. *Dinitz*, 424 U.S. 600, 611 (1976),

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions.

Thus the issue in this case is whether the circumstances leading the defendants to move for a mistrial were the result of mere judicial or prosecutorial error on the one hand, or were caused by intentional, bad-faith conduct by the Government designed to provoke the mistrial or to harass the defendants on the other. *See Drayton* v. *Hayes*, 589 F.2d 117, 121 (2d Cir. 1979).

The defendants seek to characterize the Government's conduct as a deliberate attempt to lull the defendants into a faulty defense or as an intentional strategic decision designed to "sand-bag" them. However, I find that, although the case was not as simple as the Government initially believed, its conduct did not rise to the level of deliberate overreaching which precludes reprosecution.

Well before the commencement of trial, and possibly as early as mid-March, 1980, the United States Attorney's office in the Southern District of New York was aware of a possible link between the seizure of the JOSE GREGORIO and the arrests in Maine. Indeed, it was represented that the Assistant United States Attorney then in charge of the case interrogated one of the defendants on the subject. It would appear that various governmental agencies, including the Drug Enforcement Administration and the United States Attorney for Maine, held various pieces of information which, if they had been correlated, might have established a connection between the two incidents. Assistant United States Attorney Denton made no investigation seeking to discover this Maine connection, but also did not direct any agency *not* to investigate. He apparently believed that Government's Exhibit 1, the chart, would be sufficient evidence of intent to land the cargo in the United States. This failure to pursue an active investigation may have been a mistake, but there is no evidence of malicious conduct by the prosecutor or a strategic decision designed to induce a mistrial or to harass the defendants.

AUSA Denton first learned of a specific evidentiary link between the Maine and New York incidents on the evening of Wednesday, July 9. The defendants emphasize that the Government had not rested at that point and accordingly made a deliberate election to rest on Thursday without introducing this evidence. Again, this choice may have been unwise, but does not constitute prosecutorial overreaching or "sand-bagging." The chart and the Maine connection were not inconsistent, the Maine events having preceded the seizure off Long Island by 9 days.

Although AUSA Denton learned of an evidentiary connection on Wednesday, he did not receive the actual evidence until Friday, July 11, and he had not prepared witnesses that would be required. Introduction of the new evidence would thus have necessitated delay. On the other hand, by Wednesday evening, the Government had virtually completed its case and had introduced strong evidence, including the location of the boat when seized, the quantity of marijuana, and the chart, to prove that the defendants' intended destination was the United States. Although the Government perhaps should have perceived the need for further proof on this element, its error was not malicious or grossly negligent under the circumstances.

The defendants argue that having elected to forego use of the Maine evidence on its direct case, the Government should have been precluded from revising its theory on rebuttal. However, I have already ruled that the evidence was proper rebuttal. The Government was required to prove an intent to import marijuana into the United States and introduced evidence tending to do so. Hart and Egan presented evidence to undercut the Government's proof and further to demonstrate that the defendants' intended destination was Canada. The Government was entitled to introduce evidence to rebut the defendants' theory.

Further, the defendants could have elected to go forward with appropriate adjournments to permit preparation. The defendants were not involuntarily deprived of their "valued right to have [their] guilt or innocence determined before the first trier of fact." *Scott, supra* at 93. The defendants "retain[ed] primary control over the course to be followed in the event of such error." *Dinitz, supra* at 609. Since I find an absence of deliberate harassment of the defendants or intentional inducement of a mistrial motion, the motion to preclude retrial is denied. *United States* v. *Scott, supra* at 93-94; *United States* v. *Dinitz, supra* at 608; *Drayton* v. *Hayes, supra* at 122.

The motion to dismiss under Fed.R.Cr.P. 29 is also denied. The Government presented sufficient evidence to warrant a conviction even without the evidence concerning the coast of Maine.

IT IS SO ORDERED.

Dated: New York, New York
August , 1980.

s/_____

ROBERT W. SWEET
U.S.D.J.

United States District Court
Southern District of New York

UNITED STATES OF AMERICA,

against

BARTHOLOMEW EGAN, 80 Cr. 207 (RWS)
RICHARD HART,
ANGEL DANIEL PACHECO, AND
JOSE PEDRO VASQUEZ-CASTRO, **Order**

DEFENDANTS.

Upon consideration of an application by the Government, it is hereby

ORDERED that the court's opinion in this case, filed August 27, 1980, be amended as follows: The text from the sentence beginning on line 4 of page 9, through the end of that paragraph (line 13) [A. 7a, lines 26-34] should be deleted. In its place is inserted the following text:

> Assistant United States Attorney Denton stated that he made certain inquiries of the various investigating authorities in order to verify this Maine connection, but was unsuccessful. He did not direct any agency not to investigate the possible link. The failure to connect up the evidence which might have been introduced at trial before the close of the Government's case was unfortunate, but there is no indication of malicious conduct by the prosecutor or a strategic decision designed to induce a mistrial or to harass the defendant.

Line 19 of page 9 should be amended to read "introducing this evidence. This choice may have".

IT IS SO ORDERED.

Dated: New York, New York
September 26, 1980.

s/_____

ROBERT W. SWEET
U.S.D.J.

United States Court of Appeals

Second Circuit

HONORABLE WILFRED FEINBERG
CHIEF JUDGE

HONORABLE AMALYA L. KEARSE
CIRCUIT JUDGE

HONORABLE DAVID N. EDELSTEIN
DISTRICT JUDGE

Filed:
December 29, 1980

UNITED STATES OF AMERICA,
APPELLEE,

against

BARTHOLOMEW EGAN,
RICHARD HART,
ANGEL DANIEL PACHECO, AND
JOSE PEDRO VASQUES-CASTRO,
DEFENDANTS-APPELLANTS.

80-1368

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Bartholomew Egan, Richard Hart, Angel Daniel Pacheco, and Jose Pedro Vasques-Castro, defendants below, appeal from an order of the United States District Court for the Southern District of New York, Robert W. Sweet, J., denying their motion to dismiss the indictment against them on double jeopardy grounds. We affirm the order of the district court.

Appellants were indicted and brought to trial for conspiracy to violate the federal narcotics laws, for possessing with intent to distribute some thirty tons of marijuana, and for attempted importation of the same marijuana. At trial, appellants did not deny that they were arrested at sea off the United States coast in a ship filled with marijuana. Rather, they asserted that their intent to import this cargo into the United States — rather than into Canada, for example, — could not be established beyond a reasonable doubt. The Government's case-in-chief rested largely on the proximity of the ship to the United States when it was first sighted, on the unlikelihood that thirty tons of marijuana could have been intended for sparsely populated Canada, and on a sea-chart, the only one on board, labelled, "Approaches to New York," that was seized when the ship was finally boarded by the Coast Guard. The defense then produced witnesses whose testimony tended to establish an innocent explanation for the sea-chart and to show that appellant Hart could navigate to Nova Scotia without sea-charts.

The Government then advised the district court, in camera, that it would produce rebuttal evidence, tending to prove that defendants had planned to smuggle their cargo into the United States by landing on the coast of Maine. At this time, the prosecutor asserted that although he had been aware of some likelihood that certain arrests in Maine might be linked to appellants, he had only received solid evidence of that link on that very morning. The judge ruled that the Maine evidence was proper rebuttal, and offered appellants a two-day adjournment to prepare their defense to it. Appellants instead

moved for a mistrial, on the ground that they needed more time than that. Over Government opposition, this motion was granted.

A few weeks later, appellants moved to dismiss the indictment and to prohibit retrial, on the ground of double jeopardy. That motion was denied in a careful opinion by Judge Sweet, dated August 27, 1980, in the course of which the judge found that there was "no evidence of malicious conduct by the prosecutor or a strategic decision designed to induce a mistrial or to harass the defendants." On September 5, 1980, the prosecutor sent a letter to the district court and to all defense counsel, giving a detailed account of when and under what circumstances he learned of the Maine evidence. The September 5 letter is part of the record on appeal, and led the district court, on September 26, 1980, to amend its earlier opinion denying appellants' double jeopardy motion. The amended opinion contained the same finding quoted above.

It is well settled that where "a defendant successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial, the Double Jeopardy Clause is not offended by a second prosecution." United States v. Scott, 437 U.S. 82, 93 (1978) (emphasis omitted). It is equally settled that "[t]he Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests . . .," United States v. Dinitz, 424 U.S. 600, 611 (1976), and that the Clause bars retrials where mistrial requests are prompted by "bad-faith conduct by . . . [the] prosecutor," id., quoting United States v. Jorn, 400 U.S. 470, 485 (1971).* Appellants claim

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*Appellants invite this court to add to the "bad faith" exception another exception, barring retrial where "defendant's motion for mistrial is predicated on the gross negligence of the prosecutor. United States v. Lutrell, 609 F.2d 1190, 1191 (5th Cir. 1980)." We decline appellants' invitation, and adhere to the rule of this circuit, see Mitchell v. Smith, Docket Number 79-2208, slip op. 1, 7 (2d Cir. Sept. 4, 1980).

that there was such "bad-faith conduct" here. After the district court decided to allow the Government to present the Maine evidence in rebuttal, the court offered appellants two days in which to prepare their defense to it. Appellants declined that offer, and instead moved for a mistrial for the express purpose of having more time "to investigate all aspects of this new material." The Government strongly, though unsuccessfully, opposed this motion. There is no indication in the record of any "governmental actions intended to provoke mistrial requests," and no evidence that appellants' mistrial request was prompted by anything other than a desire for more time to meet the Government's rebuttal case.

In addition, the district court concluded that the prosecutor had not acted in bad faith, after the court twice questioned the prosecutor as to when and under what circumstances the prosecutor learned of the rebuttal evidence. One of these examinations occurred in the presence of counsel for the appellants, at the conclusion of which the court offered to place the prosecutor under oath, if counsel so desired. This offer was declined. The other examination occurred in camera, later supplemented by an in camera affidavit from the prosecutor. Appellants have not been informed of the contents of this latter examination and affidavit. We agree with the conclusion of the district court. We have examined the contents of the sealed documents but we do not base our decision on those materials. Rather, we find the remainder of the record on appeal — including the September 5, 1980 letter — quite sufficient to dispel any doubt as to the prosecutor's good faith. It is not significant that the district court did not base its first decision on the September 5, 1980 letter. The letter was available to the district judge when he reaffirmed his original ruling. Under all the circumstances, and without relying on the in camera material in any way, we are satisfied that the record justifies the conclusion of the district court that there was no

provocative or bad-faith prosecutorial misconduct in the trial below.

The judgment of the district court is affirmed. Appellants' motion to strike the sealed materials from the record or to disclose them is denied.

s/_____
WILFRED FEINBERG
Chief Judge

s/_____
AMALYA L. KEARSE
Circuit Judge

s/_____
DAVID N. EDELSTEIN
District Judge